

TO: Honorable Anthony J. Scirica, Chair
Standing Committee on Rules of Practice
and Procedure

FROM: Honorable Milton I. Shadur, Chair
Advisory Committee on Evidence Rules

DATE: May 1, 2002 (Revised to account for action taken
by Standing Committee at its June 10-11
meeting)

RE: Report of the Advisory Committee on Evidence
Rules

I. Introduction

The Advisory Committee on Evidence Rules met on April 19, 2002, in Washington, D.C. At the meeting the Committee approved a proposed amendment to Evidence Rule 608(b), with the unanimous recommendation that the Standing Committee approve the proposed amendment and forward it to the Judicial Conference. Part II of this Report summarizes the discussion of this proposed amendment. An attachment to this Report includes the text, Committee Note, GAP report, and summary of public comment for the proposed amendment to Rule 608(b).

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II. Action Items

A. Recommendation To Forward the Proposed Amendment to Evidence Rule 608(b) to the Judicial Conference

At its June 2001 meeting the Standing Committee approved the publication of a proposed amendment to Evidence Rule 608(b). The Committee received 12 written comments from the public on this proposed amendment. Public hearings were cancelled because nobody expressed an interest in testifying. A complete discussion of the Committee's consideration of the public comments respecting Rule 608(b) can be found in the draft minutes attached to this Report. The following discussion briefly summarizes the proposed amendment to Rule 608(b).

The proposed amendment to Evidence Rule 608(b) is intended to bring the text of the Rule into line with the original intent of the drafters. The Rule was intended to prohibit the admission of extrinsic evidence when offered to attack or support a witness' character for truthfulness. Unfortunately the text of the Rule is phrased as prohibiting extrinsic evidence when offered to attack or support a witness' "credibility"—a less precise locution. The term "credibility" can be read to prohibit extrinsic evidence when offered for non-character forms of impeachment, such as to prove bias, contradiction or prior inconsistent statement. *United States v. Abel*, 469 U.S. 45 (1984) held that the Rule 608(b) extrinsic evidence prohibition does not apply when it is offered for a purpose other than proving the witness' character for veracity. But even though most case law is faithful to the drafters' original intent, a number of cases continue to misapply the Rule to preclude extrinsic evidence offered to impeach a witness on grounds other than character. *See, e.g., Becker v. ARCO*

Chem. Co., 207 F.3d 176 (3d Cir. 2000) (stating that evidence offered for contradiction is barred by Rule 608(b)); *United States v. Bussey*, 942 F.2d 1241 (8th Cir. 1991) (stating that the “plain language” of the Rule bars the use of extrinsic evidence to impeach a witness by way of contradiction); *United States v. Graham*, 856 F.2d 756 (6th Cir. 1988) (Rule 608(b) bars extrinsic evidence when offered to prove that the witness is biased).

The proposed amendment substitutes the term “character for truthfulness” for the overbroad term “credibility,” thereby limiting the extrinsic evidence ban to cases in which the proponent’s sole purpose is to impeach the witness’ character for veracity. This change is consistent with the Court’s construction of the Rule in *Abel*. The Committee Note to the proposed Rule clarifies that the admissibility of extrinsic evidence offered to impeach a witness on grounds other than character is governed by Rule 402 and Rule 403, not by Rule 608(b).

The public comments on the proposed amendment uniformly praised the Advisory Committee’s deletion of the overbroad term “credibility” and agreed that the Rule should be limited to its original intent, which was to exclude extrinsic evidence only when it is offered to prove a witness’ character for truthfulness, and to leave all other uses of extrinsic evidence to be regulated by Rules 402 and 403.

One public commentator noted that there are other places in the Evidence Rules where the term “credibility” is probably used to mean “character for truthfulness.” He suggested that the Committee use the occasion of the proposed amendment to address other provisions in the Evidence Rules where the term “credibility” is arguably misused. The Committee considered this comment carefully.

It unanimously determined that the proposed amendment should be revised slightly to replace the term “credibility” with the term “character for truthfulness” in the last sentence of Rule 608(b). The Committee also revised the proposed Committee Note to refer to this slight change in the text and to explain that the change was made to provide uniform terminology throughout Rule 608(b).

The Evidence Rules Committee further considered whether the term “credibility” should be changed in other Evidence Rules. The Committee determined that the term need not be changed in Rule 608(a), because that Rule already limits impeachment to evidence pertinent to a witness’ character for truthfulness. The Committee also determined that the use of the term “credibility” in Rules 609 and 610 has not created the same problems for courts and litigants as has the use of that term in Rule 608(b). The Committee found no reason to delay or withdraw the amendment to Rule 608(b) simply because the term “credibility” is used in other Evidence Rules.

Recommendation — The Evidence Rules Committee recommends that the proposed amendment to Evidence Rule 608(b), as modified following publication, be approved and forwarded to the Judicial Conference.

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Attachment[]:

Proposed Amendment to Evidence Rule 608(b) and Committee Note (recommended for approval and forwarding to the Judicial Conference).

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**PROPOSED AMENDMENT TO THE
FEDERAL RULES OF EVIDENCE***

**Rule 608. Evidence of Character and Conduct of
Witness**

1 **(a) Opinion and reputation evidence of character.**

2 — The credibility of a witness may be attacked or
3 supported by evidence in the form of opinion or
4 reputation, but subject to these limitations: (1) the
5 evidence may refer only to character for truthfulness
6 or untruthfulness, and (2) evidence of truthful
7 character is admissible only after the character of the
8 witness for truthfulness has been attacked by opinion
9 or reputation evidence or otherwise.

10 **(b) Specific instances of conduct.** — Specific
11 instances of the conduct of a witness, for the purpose
12 of attacking or supporting the witness' ~~credibility~~
13 character for truthfulness, other than conviction of

* New material is underlined; matter to be omitted is lined through.

2 FEDERAL RULES OF EVIDENCE

14 crime as provided in rule 609, may not be proved by
15 extrinsic evidence. They may, however, in the
16 discretion of the court, if probative of truthfulness or
17 untruthfulness, be inquired into on cross-examination
18 of the witness (1) concerning the witness' character
19 for truthfulness or untruthfulness, or (2) concerning
20 the character for truthfulness or untruthfulness of
21 another witness as to which character the witness
22 being cross-examined has testified.

23 The giving of testimony, whether by an
24 accused or by any other witness, does not operate as
25 a waiver of the accused's or the witness' privilege
26 against self-incrimination when examined with
27 respect to matters ~~which~~ that relate only to ~~credibility~~
28 character for truthfulness.

COMMITTEE NOTE

The Rule has been amended to clarify that the absolute prohibition on extrinsic evidence applies only when the sole reason for proffering that evidence is to attack or support the witness' character for truthfulness. *See United States v. Abel*, 469 U.S. 45 (1984); *United States v. Fusco*, 748 F.2d 996 (5th Cir. 1984) (Rule 608(b) limits the use of evidence "designed to show that the witness has done things, unrelated to the suit being tried, that make him more or less believable per se"); Ohio R.Evid. 608(b). On occasion the Rule's use of the overbroad term "credibility" has been read "to bar extrinsic evidence for bias, competency and contradiction impeachment since they too deal with credibility." American Bar Association Section of Litigation, *Emerging Problems Under the Federal Rules of Evidence* at 161 (3d ed. 1998). The amendment conforms the language of the Rule to its original intent, which was to impose an absolute bar on extrinsic evidence only if the sole purpose for offering the evidence was to prove the witness' character for veracity. *See* Advisory Committee Note to Rule 608(b) (stating that the Rule is "[i]n conformity with Rule 405, which forecloses use of evidence of specific incidents as proof in chief of character unless character is in issue in the case . . .").

By limiting the application of the Rule to proof of a witness' character for truthfulness, the amendment leaves the admissibility of extrinsic evidence offered for other grounds of impeachment (such as contradiction, prior inconsistent statement, bias and mental capacity) to Rules 402 and 403. *See, e.g., United States v. Winchenbach*, 197 F.3d 548 (1st Cir. 1999) (admissibility of a prior inconsistent statement offered for impeachment is governed by Rules 402 and 403, not Rule 608(b)); *United States v. Tarantino*, 846 F.2d 1384 (D.C.Cir. 1988) (admissibility of extrinsic evidence offered to contradict a witness is governed by Rules 402 and 403); *United States*

v. *Lindemann*, 85 F.3d 1232 (7th Cir. 1996) (admissibility of extrinsic evidence of bias is governed by Rules 402 and 403).

It should be noted that the extrinsic evidence prohibition of Rule 608(b) bars any reference to the consequences that a witness might have suffered as a result of an alleged bad act. For example, Rule 608(b) prohibits counsel from mentioning that a witness was suspended or disciplined for the conduct that is the subject of impeachment, when that conduct is offered only to prove the character of the witness. See *United States v. Davis*, 183 F.3d 231, 257 n.12 (3d Cir. 1999) (emphasizing that in attacking the defendant's character for truthfulness "the government cannot make reference to Davis's forty-four day suspension or that Internal Affairs found that he lied about" an incident because "[s]uch evidence would not only be hearsay to the extent it contains assertion of fact, it would be inadmissible extrinsic evidence under Rule 608(b)"). See also Stephen A. Saltzburg, *Impeaching the Witness: Prior Bad Acts and Extrinsic Evidence*, 7 *Crim. Just.* 28, 31 (Winter 1993) ("counsel should not be permitted to circumvent the no-extrinsic-evidence provision by tucking a third person's opinion about prior acts into a question asked of the witness who has denied the act.").

For purposes of consistency the term "credibility" has been replaced by the term "character for truthfulness" in the last sentence of subdivision (b). The term "credibility" is also used in subdivision (a). But the Committee found it unnecessary to substitute "character for truthfulness" for "credibility" in Rule 608(a), because subdivision (a)(1) already serves to limit impeachment to proof of such character.

Rules 609(a) and 610 also use the term "credibility" when the intent of those Rules is to regulate impeachment of a witness' character for truthfulness. No inference should be derived from the

fact that the Committee proposed an amendment to Rule 608(b) but not to Rules 609 and 610.

CHANGES MADE AFTER PUBLICATION AND COMMENTS

The last sentence of Rule 608(b) was changed to substitute the term “character for truthfulness” for the existing term “credibility.” This change was made in accordance with public comment suggesting that it would be helpful to provide uniform terminology throughout Rule 608(b). A stylistic change was also made to the last sentence of Rule 608(b).

SUMMARY OF PUBLIC COMMENTS

Thomas J. Nolan, Esq. (01-EV-001) states that the proposed amendment to Rule 608(b) is “extremely important, should be adopted, and can and will significantly increase the administration of justice in the United States Courts.”

Mikel L. Stout, Esq. (01-EV-002) approves of the proposed amendment.

The Committee on Civil Litigation of the United States District Court for the Eastern District of New York (01-EV-003) endorses the proposed change to Rule 608(b).

The Federal Magistrate Judges Association (01-EV-004) supports the proposed amendment and notes that it “is consistent with the drafters’ original intent and Supreme Court authority.”

Professor Lynn McLain (01-EV-005) supports the proposed amendment on the ground that it “clarifies the rule and removes an

arguable, though unintended, conflict with cases permitting extrinsic proof of bias and of contradiction”

Professor John C. O’Brien (01-EV-006) supports the proposed change to Rule 608(b). He states that some Evidence Rules use the term “credibility” to refer to “character for truthfulness” and that this usage “has created considerable confusion, particularly with respect to whether extrinsic evidence is precluded by Rule 608(b).” He contends that the problem of misuse of the term “credibility” is not limited to Rule 608(b) and that the Advisory Committee consider proposing similar amendments to replace the term “credibility” with the term “character for truthfulness” in Rules 608(a), 609 and 610.

The Committee on the Federal Rules of Evidence of the American College of Trial Lawyers (01-EV-009) recommends the adoption of the proposed amendment to Rule 608(b), noting that it is “a modest and benign narrowing clarification of the existing rule.” The Committee states that “the Advisory Committee is correct in suggesting that the proposed amendment brings the rule’s language in line with its original intent and corrects a less precise locution that has led to unfortunate results in some cases.”

The Federal Bar Association, Western Michigan Chapter (01-EV-012) supports the proposed amendment to Rule 608(b).

The State Bar of California’s Committee on Federal Courts (01-EV-013) supports the proposed modification of Rule 608(b).

Professor James J. Duane (01-EV-014) recommends that the proposed change to Rule 608(b) should be made, “but only if the word ‘credibility’ is also replaced with ‘character for truthfulness’ throughout all of Rules 608, 609 and 610.” He argues that the change

proposed by the Advisory Committee “would result in a situation whether the word ‘credibility’ would mean one thing in Rule 608(b), and something quite different in two other parts of the same Rule, as well as the two rules that follow it.”

The Committee on the United States Courts of the State Bar of Michigan (01-EV-016) supports the proposed amendment to Rule 608(b).

The National Association of Criminal Defense Lawyers (01-EV-017) “fully supports the proposed amendment to Evidence Rule 608(b).” The Association notes that the proposed amendment “only makes more clear what the Rule already intends – that the prohibition against proving a specific instance of conduct by a witness with extrinsic evidence only applies where the specific instance of conduct is offered to attack or support the witness’s character for truthfulness.”